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IN THE UNITED STATES BANKRUPTCY COURT  
FOR THE DISTRICT OF ARIZONA

In re:	)	Case Nos. 98-12547
	)	Through 98-12570
BCE WEST, L.P., et al.	)	Inclusive
	)	(Chapter 11)
	)	
Debtors	)	
	)	OBJECTION OF COLUMBIA GAS OF
	)	OHIO, INC., COLUMBIA GAS OF
	)	PENNSYLVANIA, INC. AND COLUMBIA
	)	GAS OF VIRGINIA, INC. TO DEBTORS'
	)	MOTION FOR ORDER DETERMINING
	)	ADEQUATE ASSURANCE OF PAYMENT
	)	<u>FOR FUTURE UTILITY SERVICES</u>

Now come Columbia Gas of Ohio, Inc., and Columbia Gas of Pennsylvania, Inc. and Columbia Gas of Virginia, Inc. (collectively, "Columbia Gas" ), to object to Debtors' Motion for Order Determining Adequate Assurance of Payment for Future Utility Services.

Each Columbia Gas is a Public Utility within the meaning of Section 366 of the Bankruptcy Code. Columbia Gas has supplied, and continues to supply natural gas service, to certain of Debtors, primarily in the name of Boston Market, P&L Food Services and Mayfair Partners ("Debtors"). Debtors have at least approximately fourteen or more natural gas service accounts with Columbia Gas, to

be supplemented with Debtors' counsel as soon as possible (See attached Exhibits A, and B ).

Debtors filed voluntary Chapter 11 petitions with this Court on October 5, 1998. Subsequently, on October 7, 1998, Debtors filed a Motion to Determine Adequate Assurance of Payment of Utilities Required Under 11 U. S. C. & 366. A notice with the Motion provides for written objections to be filed in writing by October 20, 1998 and hearing on the Motion is set for October 26, 1998.

In their Motion, Debtors appear to suggest that (1) pre-petition history of payments suggests no additional requirements should be made for Adequate Assurance of Future Payments and (2) an Administrative Expense priority provides Adequate Assurance of Future Payment. And finally, the Debtors suggest a mechanism for utility companies to terminate service if there is a default in post petition payments. Columbia Gas hereby objects to the Motion and Requests the Security Deposits shown on the Exhibits Attached. The grounds for the objection are as follows:

**I. Administrative Expense Is Inadequate**

The Debtors have urged that the granting of an administrative expense priority constitutes adequate assurance of payment. Presumably, the Debtors are contending that they are "offering" something to which Columbia Gas is not already entitled.

Such an interpretation of the Bankruptcy Code is impermissible. As any other post-petition creditor, Columbia Gas is entitled to receive an administrative expense priority as a matter of course. In re: Penn Jersey Corporation, 72 B.R. 981, 989 (Bankr. E.D. Pa. 1987); 11 U.S.C. § 503 (b) (1) (A). See also, Collier On Bankruptcy, ¶366.03 (15th ed. 1989). Accordingly, the Debtors are not proposing anything more than Columbia Gas is already entitled to receive in this bankruptcy case. Moreover, the Debtors have not even shown to Columbia Gas that sufficient unencumbered assets exist to pay administrative expenses, beyond a mere suggestion in their Motion that funds or wherewithal to pay Administrative Expenses would be available. The failure to show sufficient unencumbered assets to pay administrative expenses would further indicate that Columbia Gas is not adequately assured as required.

Although some cases have implied that under certain circumstances (i.e., the debtor has significant unencumbered assets, paid its pre-petition utility bills by the due date, and apparently has a high likelihood of success in Chapter 11) an administrative expense may be considered adequate assurance of payment, none of these courts has specifically held that in the case before it an administrative expense alone constituted adequate assurance. For example, in in re: Santa Clara Circuits West, Inc., 24 B.R. 680 (Bankr. D. Utah 1981), the court implied that in some cases an administrative expense could serve as adequate assurance

but held, even though the debtor only owed the utility \$29.00 pre-petition, that an administrative expense would not provide adequate assurance. Similarly, in In re: Keydata Corp., 12 B.R. 156 (Bankr. D. Mass. 1981), the court made the same implication but was faced with the situation where the debtor had made a \$25,000.00 adequate assurance deposit so the utility company was only at risk for thirteen (13) days worth of service. The court found that a reduced deposit coupled with an administrative expense constituted adequate assurance because a thirteen (13) day exposure was not unreasonable under the facts of that case. See, also, In Re Stagecoach Enterprises, Inc., 1 Bank. 732, 734 (M.D. Fla. 1979) in which the Court stated, "In the opinion of this Court it is not generally appropriate to give administrative expenses priority to debts incurred by the debtor for utility services.... if debtor is to be allowed to continue to operate the business, it should pay its utility bills on a current basis and should furnish adequate assurance of payment in the traditional forms of a cash deposit, a payment on bond or some similar device".

As stated earlier, an offer of administrative expense priority is no offer at all. The supplying of gas service almost always constitutes a benefit to the estate giving rise to a valid administrative expense claim under Section 503(b)(1)(A), 11 U.S.C. § 503(b)(1)(A) and possibly a surcharging claim under Section 506(c). See In re: Delta Towers Ltd., 924 F.2d 74 (5th Cir. 1991).

Courts, such as Santa Clara, supra, that have entertained the possibility of an administrative expense priority alone constituting adequate assurance have looked to the legislative history contained in House Report No. 95-595, 95 Cong., 1st Sess. (1977). This is the same House Report relied upon by Debtors in the motion at hand. House Report No. 95-595, 95 Cong., 1st Sess. states as follows:

If an estate is sufficiently liquid, the guarantee of an administrative expense priority may constitute adequate assurance of payment for future services. It will not be necessary to have a deposit in every case.

While the House Report envisioned that an administrative expense priority may constitute adequate assurance of payment, Section 366(b) is, however, derived from the Senate amendment to Section 366(b). The difference between the Senate bill and the House bill can be more easily be seen in the following where the House differences are bracketed and bolded and the Senate differences are underscored:

(b) Such utility may alter, refuse, or discontinue service if neither the trustee nor the debtor [**provides such adequate assurance of payment for services after the order for relief as the court, as soon as practical after such date but before thirty (30) days after the date of the order for relief, and notice and a hearing, orders**] within ten (10) days after the date of filing of the petition, furnishes adequate assurance of payment, in the form of a deposit or other security, for services after the date of the filing of the petition. After the application the court,

*after notice and hearing, may order reasonable modification of the amount of the deposit or other security necessary to provide adequate assurance of payment.*

The legislative history regarding the House variation of the proposed bill is inapplicable, since the House bill did not include the Senate language requiring that adequate assurance of payment be "in the form of a deposit or other security". As correctly analyzed by the editors of the Norton Bankruptcy Law and Practice Bankruptcy Code, Annotated Edition for 1991-92:

The House Report to the Reform Act of 1978 also indicates that an administrative expense priority may constitute adequate assurance of payment for future service. H.R. 8200 § 366(b) referred only to adequate assurance of payment, and the House Report correctly noted that this could include an administrative expense priority. But the Senate version of § 366(b) required "adequate assurance of payment, in the form of a deposit or other security." This limiting language clearly contemplates more than an administrative expense, and it would therefore appear that because the Senate language is used in § 366(b) of the Code, the House comment that an administrative expense priority is adequate assurance is not necessary so as to Section 366(b) of the Code.

Norton Bankr. Code Pamphlet 1991-92 Ed., Page 318. Clearly, the plain language of the statute and a correct view of the inapplicability of the House Report leads to the conclusion that an administrative expense priority can never be deemed "adequate assurance of payment". The choice, for adequate assurance, is between a deposit or other security. The fact that an

administrative expense priority cannot be viewed as "other security" for the purpose of adequate assurance of future payment for utility services is underscored by the definition of "security" under the Bankruptcy Code, Section 101(49). Nowhere in that section is an administrative expense priority included in the definition of security.

**II. Default on Pre-petition Debt is not a Prerequisite to a Utility's Ability to Request a Security Deposit for Adequate Assurance of Payment Under Section 366(b) of the Bankruptcy Code**

Citing a line of cases from United States Bankruptcy Courts in Pennsylvania, Debtors maintain that " a debtor who has not defaulted on pre-petition utility obligations should not be required to provide a post petition utility deposit" , Motion, par. 24. (citing In re Shirey 25 B.R. 247, 249 (Bankr. E.D. Pa. 1982). Shirey was based upon the misinterpretation of Section 366 which states that subsections (a) and (b) can only be read in conjunction with one another. In the case at hand, this Court is not bound by the erroneous interpretation of Section 366(b) handed down by the Bankruptcy Courts in Pennsylvania.

The better line of reasoning is represented by cases which focus on the plain meaning of section 366. See e.g. In re 499 W. Warren Street Associates, Ltd. 138 B.R. 363 (Bankr. N.D.N.Y. 1991); In re Smith, Richardson & Conroy, 50 B.R. 5 (Bankr. S.D. Fla. 1985). In the 499 W. Warren Street case, the United States Bankruptcy Court for the Northern District of New York properly concluded that pre-petition default is not a prerequisite to a

request for adequate assurance of payment after the twenty day period has elapsed. In 499 Warren W. Street, the Court criticized various cases, including Shirley, for their interpretation of section 366. According to the 499 Warren W. Street Court:

[B]oth subsection (a) and (b) [of section 366] are effective by their own terms irrespective of the status of a debtor's pre-petition account. ... It is, therefore, surprising that, while seemingly clear on its face, Code § 366(b) has occasionally been subjected to peculiar judicial interpretation since its inception as part of the Code in 1978.

Directly criticizing Shirley and other cases, the 499 Warren W. Street Court stated that there is no

support for the contention that Code § 366(b) must be read in conjunction with § 366(a). Indeed, nothing in the legislative history of Code § 366 intimates as much. Nor should it, because the language of the statute is unambiguous.

Code § 366(a) expressly states that subsection (b) is an exception to subsection (a), as indicated by the preface "except as provided in subsection (b) of this section. ... Thus subsection (b) can be read in conjunction with subsection (a) only insofar as to give effect to the exception, which establishes the general proposition that a utility may not terminate service within 20 days from the order for relief, *but may terminate service after 20 days if adequate assurance of future payment is not provided.*

The two subsections cannot be properly read in conjunction to establish that a utility may not demand adequate assurance of future payment in the absence of pre-petition arrears. ... *The plain language of the statute simply does not limit a utility's right to adequate assurance on the basis of a debtor's pre-petition account status.*

499 Warren W. Street at 365 (emphasis added)(citations omitted). Thus, notwithstanding Debtors' argument to the contrary, Section 366 of the Bankruptcy Code does not require default on pre-petition



utility debts in order for a utility to seek adequate assurance of payment for post-petition utility services.

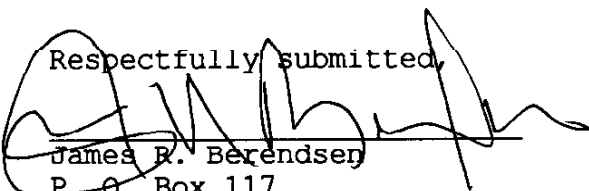
**III. Public Utility should be able to Terminate Service if Failure to make Post Petition Payment**

The Debtor's motion suggests that utilities cannot alter, refuse, or discontinue service until time of confirmation. It would appear that the Debtor has proposed a reasonable plan, if not changed, that would provide Columbia Gas with adequate means to terminate service, after notice, if a post petition default occurs. Columbia Gas therefore, supports the proposal contained in the Debtors' Motion with regard to post petition default.

**CONCLUSION**

Debtors should be required to make adequate assurance of payment for future utility service furnished by Columbia Gas of Ohio, Inc. and Columbia Gas of Kentucky, Inc. should be permitted to terminate service for failure to pay for post petition service. Columbia Gas asks that this objection be received and considered without the hardship and expenses attendant to traveling to Phoenix, AZ from Columbus, OH.

Respectfully submitted,

  
James R. Berendsen

P. O. Box 117

200 Civic Center Drive

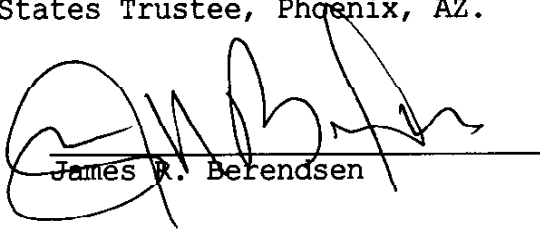
Columbus, Ohio 43216-0117

(614) 460-4650

Attorney for  
Columbia Gas of Ohio, Inc.

**CERTIFICATE OF SERVICE**

I hereby certify that I have served a copy of the foregoing Objection this 19th day of October, 1998 by fax and overnight Express on Randolph J. Haines, Esq., Lewis and Roca LLP, 40 North Central Avenue, Phoenix, AZ 85004-4429, and by ordinary U. S. on H. Ray Stroube, III, Esq., Akin, Gump, Strauss, Hauer & Feld, LLP, 1900 Pennzoil Place-South Tower, 711 Louisiana , Houston, Texas 770002 and the United States Trustee, Phoenix, AZ.

  
James R. Berendsen

**EXHIBIT A**  
**COLUMBIA GAS OF OHIO, INC.**  
Page 1 of 2

**Boston Market # 35**  
2741 E Main St., Columbus, Oh  
PCID 14422962-001  
Acct. Bal. \$673.41  
Security Deposit : \$997.00

**Boston Market # 88**  
3072 Kingsdale Cn., Columbus, Oh  
PCID 14423874-001  
Acct. Bal. \$676.04  
Security Deposit : \$1022.00

**Boston Market # 143**  
113 W Schrock Rd., Westerville, Oh  
PCID 14424812-001  
Acct. Bal. \$914.04  
Security Deposit : \$1405.00

**Boston Market # 312**  
6330 Tussing Rd., Reynoldsburg, Oh  
PCID 14422427-001  
Acct. Bal. \$701.02  
Security Deposit : \$1476.00

**Boston Market # 409**  
5150 Tuttle Crossin Bv. , Dublin, Oh  
PCID 14422473-001  
Acct. Bal. \$1117.21  
Security Deposit : \$2044.00

**Boston Market # 613**  
4310 W Broad St., Columbus, Oh  
PCID 14423041-001  
Acct. Bal. \$883.15  
Security Deposit : \$1505.00

**Boston Market # 824**  
6515 Sawmill Rd., Dublin, Oh  
PCID 14422744-001  
Acct. Bal. \$697.00  
Security Deposit : \$1258.00

**EXHIBIT A (CON'T)**  
**COLUMBIA GAS OF OHIO, INC.**

**Page 2 of 2**

**Boston Market # 1982**  
**878 Bethel Rd., Columbus, Oh**  
**PCID 14722297-001**  
**Acct. Bal. \$471.56**  
**Security Deposit : \$956.00**

**P and L Food Services**  
**50707 Valley Frontag Rd., St Clairsville, Oh**  
**PCID 14741369-001**  
**Acct. Bal. \$893.11**  
**Security Deposit : \$829.00**

**P & L Food Services LLC**  
**377 Granville St., Gahanna, Oh**  
**PCID 14707000-001**  
**Acct. Bal. \$475.24**  
**Security Deposit : \$1017.00**

EXHIBIT B  
COLUMBIA GAS OF VIRGINIA  
Page 1 of 1

Boston Market  
10827 Hull ST RD ST. 101  
Midlothian, VA 23112-3315  
Account #14610321-001 2  
**Account Balance \$ 566.30**  
**Deposit Amount Needed - \$1597.00**

Boston Market #1426  
11500 Midlothian Turnpike Z  
Richmond, VA 23235-4761  
Account # 14586931-001  
**Account Balance \$ 577.39**  
**Has active deposit now for \$250.00**  
**Deposit Amount Needed - \$1821.00**

Mayfair Partners #180  
1492 North Point VI CN  
Reston VA 20190  
Account #13891140-001  
**Account Balance \$ 686.26**  
**Deposit Amount Needed - \$2350.00**